U.S. SUPREME COURT GRANTS CERTIORARI IN TWO ANTITRUST CASES

The U.S. Supreme Court granted *certiorari* in two cases that will bring important antitrust issues before the Court during the 2006-2007 Term. In these cases, the Court will consider (1) the interaction of the antitrust laws with the statutory scheme for regulating public offerings of securities, which raises important questions about the proper scope of implied antitrust immunity, and (2) whether vertical minimum pricing agreements should remain in the category of conduct that is always deemed to be illegal under the antitrust laws.

1. Implied Immunity Doctrine - *Credit Suisse First Boston Ltd. v. Billing*, No. 05-1157

At issue in *Billing* is whether several antitrust complaints predicated on an alleged conspiracy to manipulate the aftermarket prices of hundreds of technology stocks sold in initial public offerings ("IPOs") should be dismissed based on the implied immunity doctrine.

The complaints allege that underwriting firms entered into illegal contracts with purchasers of IPO securities and executed a series of manipulations that inflated the price of the securities in the aftermarket. The alleged conduct at issue included "tie-ins," where underwriters allegedly required IPO customers to pay consideration in addition to the stated offering price to obtain IPO shares. The conduct also allegedly included "laddering," a form of tie-in requiring customers to place bids or purchase quantities of stock in the aftermarket at prearranged prices above the IPO price in order to obtain IPO shares.

The district court dismissed the complaint on the grounds that the securities laws impliedly repealed federal antitrust laws with respect to the conduct alleged. The court found that the Securities and Exchange Commission (the "SEC") explicitly permits, or has the power to regulate, much of the conduct alleged and that a failure to find implied immunity would conflict with the SEC's overall regulatory scheme. The Second Circuit vacated and remanded, concluding that no legislative history indicates that Congress intended to immunize anticompetitive tie-in arrangements and that the SEC could not compel such anticompetitive conduct. The Second Circuit further found that the underwriters failed to identify any portion of the securities laws that would be "rendered nugatory" by application of the antitrust laws to the alleged tie-in conduct.

Petitioner underwriters have asked the Supreme Court to reverse the Second Circuit decision, arguing that the correct standard for implying antitrust immunity is whether there is the potential for conflict with the securities laws. Petitioners argue that the Second Circuit erred in finding that implied immunity requires a specific expression of congressional intent to immunize, coupled with the power of the SEC to compel the practices at issue.

Notably, in the proceedings below, the SEC and the Department of Justice (the "DOJ") advocated opposing positions. The SEC advocated that antitrust immunity is appropriate in the intensely regulated area of securities underwriting to protect the effectiveness of the regulatory regime. The DOJ argued that the underwriters were entitled to implied immunity for conduct expressly or implicitly approved by the securities laws or by SEC regulation. The DOJ argued, however, that the allegations of tying and laddering -- practices prohibited under the securities laws and that the SEC has never permitted or proposed to permit -- should not be dismissed on implied immunity grounds. The SEC and DOJ have altered their positions and now jointly advocate an apparent middle ground. They now argue that to survive a motion to dismiss on grounds of implied antitrust immunity, a complaint predicated on collusive activity in the securities market must set forth allegations that the claims do not rest on collaborative activities that are either permitted under the securities laws or inextricably intertwined with such permissible activities.

The Court's decision to grant *certiorari* in *Billing* follows the Second Circuit's denial of class certification in several related cases that accuse many of the same defendants of violating federal securities laws by engaging in substantially similar conduct.

2. Minimum Pricing Agreements - *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, No. 06-480

By granting certiorari in *Leegin*, the Court has agreed to reconsider a 95-year-old precedent that bars manufacturers and distributors from setting minimum resale prices for a manufacturer's products. The rule now challenged in *Leegin* dates back to the 1911 Supreme Court decision in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911). *Dr. Miles* established the well-known antitrust principle that any vertical agreement between a manufacturer and one or more of its distributors that sets a minimum resale price for the manufacturer's products is per se unlawful. In antitrust law, a "*per se*" violation is deemed to be an automatic violation regardless of its reasonableness or any actual effect on competition.

In *Leegin*, a retail store filed suit against Leegin, the manufacturer, after Leegin cut off the supply of its products to the store for failure to adhere to its suggested retail prices. Leegin had previously announced that it would do business only with retailers that followed its suggested retail prices. The retail store filed suit, alleging that Leegin's pricing policy constituted an unlawful agreement in restraint of trade. The district court refused to allow Leegin to introduce evidence that its pricing policy was procompetitive. The district court also denied Leegin's request for an instruction to the jury that would have allowed application of the less strict rule-of-reason standard as opposed to the per se rule. The jury returned a verdict against Leegin, awarding over $3.6 million in damages and attorneys fees. The Fifth Circuit affirmed, finding that lower courts remain bound by the *Dr. Miles* precedent.

In recent years, the *per se* treatment of vertical resale price agreements has been increasingly criticized on the grounds that such vertical restrictions can be procompetitive, particularly with respect to interbrand competition. In addition, the Supreme Court has already rejected a rule of per se invalidity for vertical nonprice restraints and for maximum resale price restraints.

Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977); *State Oil v. Khan*, 522 U.S. 3 (1997). The Court now has the opportunity to dispense with the *Dr. Miles* precedent and find that the rule-of-reason should also apply to minimum resale pricing agreements.

3. Other Supreme Court Antitrust Cases This Term

Billing and *Leegin* join two other antitrust matters already on the Court's docket for the 2006-2007 Term, *Bell Atlantic Corp. v. Twombly*, No. 05-1126 (addressing whether allegations of parallel conduct and an assertion that such conduct is the result of a conspiracy states a claim for violation of Section 1 of the Sherman Act), and *Weyerhaeuser Co. v. Ross-Simons Hardware Lumber Co.*, No. 05-381 (considering the appropriate legal standard for determining whether certain buying practices are predatory and a violation of federal antitrust laws), both of which were argued before the Court in October 2006.

Billing and *Leegin* will likely be scheduled for oral argument sometime this spring. Briefs on the merits are currently due in late January 2007 for Petitioners and in late February 2007 for Respondents. It is likely that in both cases interested parties will file individual amicus curiae briefs. A variety of interests filed such briefs on the *certiorari* issue in both cases.

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